MORNING APPEAL

VOL. LXVI. CARSON CITY, NEVADA SUNDAY MORNING, FEBRUARY 11, 1906. No. 137

IN THE SUPREME COURT OF THE STATE OF NEVADA

The State of Nevada ex. rel.,
Nevada Title Guaranty and Trust Company, a corporation.
Plaintiff and Relator
V.
Puddy Grimes, as County Recorder in and for the County of Nye, State of Nevada.
Defendant and Respondent

PETITION FOR WRIT OF MANDATE

Geo. S. Green, Alfred Chartz and T. A. A. Siegfried, for Relator.
Wm. Forman, for Defendant.

Syllabus by the Court:

1. Under Sec. 2663 and 2664, Nev. Compl. Laws, providing that every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, or whereby and real estate may be effected, proved, acknowledged, certified and recorded in the manner prescribed, "shall from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice" and under other statutes ennumerated, as construed in connection with the common law, a corporation organized for the purpose of furnishing abstracts and guaranteeing titles, may, free of charge, through its agents and employees during regular business hours inspect and make memoranda and copies of all files and records in the office of the County Recorder in so far as they relate to current transactions in which it is authorized or employed to make searches, furnish abstracts or guarantee titles by persons having or seeking to acquire, an interest in property; the examination to be made at such times and under such circumstances as will not prevent the Recorder or his assistants from discharging their duties, nor interefere with the rights of other persons to have access to the records.

2. Under the laws mentioned relator has not the right to copy or inspect all records for the purpose of compiling an independent set of abstract books, covering all the property to which the records relate, and for use in equipping an office in opposition to the recorder.

DECISION.

To what extent is a company engaged in the business of furnishing abstracts and guarantying titles allowed to inspect, examine and copy the records in the office of the County Recorder, without the payment of fees, is the question presented. From the petition, answer and agreed statement of facts it appears that the respondent as county recorder has refused, and unless ordered by this court will continue to refuse, to allow relator, or its duly authorized secretary and general manager, either for itself or as agent for the owner of the property, to inspect, copy or make memoranda of the record of a specified certificate of mining location, and of a certain deed and other records in the office of the county recorder of Nye County; that the relator seeks and has demanded to inspect and copy these records free of charge for the purpose of compiling an independent set of abstract books covering all the property pertaining to these records with the intention of supplying and selling abstracts to its customers; respondent was and is willing to permit relator's agent to inspect the records for his personal use and information provided that he does not take any compensation or fees from any other person for so doing, but refuses to allow him or the relator to inspect or copy the records for the use of relator in preparing abstracts except upon payment of the fees allowed by law for making such abstracts.

The relator in the pursuit of his abstracting, record searching and title guarantee business and for the purpose of preparing a set of abstract books, had engaged one man continuously for three or four months in searching these records, taking memoranda and making copies, and if permitted will continue for three or four months to keep one or more men engaged in copying, searching and taking memoranda, and when the abstract books of relator are completed, relator will demand the right to inspect and take memoranda from the record of all conveyances thereafter filed, for the purpose of keeping up to date its abstract books and for its use in compiling abstracts of title.

Relator claims that under our statutes and also under the Common Law it has a right to examine and copy all these records. Respondent challenges both these contentions and asserts that as no such privilege is conferred by statute the Common Law controls and limits the rights of inspection to persons having an interest in the subject matter to which the record relates.

In seeking light and authority on these propositions we first turn to the Statutes and fined provided in the Compiled Laws:

Sec. 2663 and 2664. Every conveyance of real estate and every instrument of writing setting forth an agreement to convey any real estate, or whereby any real estate may be effected, proved, acknowledged, certified and recorded in the manner prescribed, "shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchases and mortgagees shall be deemed to purchase and take with notice."

Sec. 2715. "A mortgage upon possessory claims to public lands, all buildings and improvements upon such lands, all quartz and mining claims, and all such personal property as shall be fixed in its structure to the soil, acknowledged in manner and form as mortgages upon real estate are required by law to be acknowledged and recorded in the office of the county recorder in which the property is situated, shall have the same effect against third persons as mortgages upon real estate."

Section 2705 directs the several county recorders to procure suitable books at the expense of the county in which all chattel mortgages shall be recorded and provides that "such books shall, at all times, be open to the public for inspection."

Section 2718. "All instruments of writing now copied into the proper books of record of the office of County Recorders of the several counties of this territory, shall, after the passage of this act be deemed to impart to subsequent purchasers, and all other persons whomsoever, notice of all deeds, mortgages, powers of attorney, contracts, conveyances or other instruments, notwithstanding any defect, omission or informality existing in the execution, acknowledgment or certificate of recording the same."

Section 2730 provides that certain officers including recorders "authorized by law to take the proof or acknowledgment of the execution of conveyances of real estate, or other instruments required by law to be proved or acknowledged, shall keep a record of all their official acts in relation thereto in a book to be provided by them for that purpose, the date of the instrument, the name or character of the instrument proved or acknowledged, and the names of each of the parties thereto, as grantor, grantee, or otherwise. Said records shall, during business hours, be open to public inspection without fee or reward."

Section 2736. "All instruments of writing relating to mining claims now copied into books of mining or other records, now in the office of the county recorders of the several counties of this State, shall, after the passage of this Act, be deemed to impart to subsequent purchasers and incumbrancers, and all other persons whomsoever, notice of the contents thereof."

Section 3364 provides for notice of the pendency of an action and "that from the time of filing it shall be notice to all persons."

Section 3396 makes the record of conveyances in partition suits a bar against persons interested in the property.

Section 2453 provides that filing with the recorder shall be deemed notice of the appointments and revocations of deputy county officers.

Section 3304 provides that a transcripts of the original docket of judgments in the District Court certified by the Clerk may be filed with the recorder of any other county, "and from the time of the filing, the judgment shall become a lien upon the property of the judgment debtor in such county," but does not direct the method or extent of inspection there: by section 3652 it is enacted that "no judgment rendered by a Justice of the Peace shall create any lien upon the lands of the defendant unless a transcripts of such judgment certified by the justice is filed and recorded in the office of the county recorder."

Section 2348 directs that certain newspapers be preserved by the recorders, and that strangers and inhabitants of the county "shall have access to the same at all times during business hours, free of charge."

Section 2776 provides that the record of partnership certificates shall be "open to public inspection," and Sec. 755, that estray notices "shall be subject to examination by all persons making application to the recorder."

Statutes 1905 page 221 make it the duty of county and district recorders to keep a receiving book in which they shall enter the name of each document in the order in which it is filed, its number and date of filing and the amount of fees collected for its recording or filing and the same is made the fee book of the recorder open to anyone desiring to inspect.

There are other sections providing for the filing or recording in the office of the county recorder of mining location notices, 210, 232 and 238; proof of annual labor on mines, 217; notice of location of tunnel rights, 228; location of mill sites, 224; inventories of the separate property of married women, 512 and 512; marriage settlements, 539; orders relating to the rights and property of sole traders, 546 and 547; certificates of tax sales, 1112; declarations of homestead 550; decrees setting apart homesteads, 3040; copies of writs of attachment, 3223; certificates of sale on execution, 3326; certificates of construction of ditches and flumes, 425; affidavits of service of notice to delinquent co-owners of mines, 218; liens to mechanics, miners and others, 2885; State Engineer's list of priorities of appropriations of water, Stat., 1903, p. 28.

Section 1613 provides that certain records and papers pertaining to elections, "shall be subject to the inspection of any elector."

Section 2483 requires officers to keep fee books "open to the inspection of any one desiring to inspect the same."

Under section 1212 the books of revenue officers are "open to any person whomsoever to inspect or copy, without any fee or charge.

There are provisions relating to other officers, for illustration, Sec. 2110 directing that the books, records and accounts of the Boards of County Commissioners "shall be kept by the Clerk, during business hours, open to public inspection free of charge;" Section 303 providing that the plats, papers and documents in the office of the State Land Register "shall be open to public inspection during office hours without fee therefor," and that county assessors "shall keep copies of township plats subject to the inspection of the public free of charge;" Section 2148 providing for publicity by publication of the allowance of bills against the county; Section 2328 requiring county treasurers, "at all times to keep their books and office subject to the inspection and examination of the Boards of County Commissioners;" Section 4147 entitles grand juries "to the examination without charge of all public records;" Section 3303 requires that the docket of judgments in the district courts "shall be open at all times during office hours for the inspection of the public without charge," and that the clerk shall arrange the docket in such a manner as to faciliate inspection.

We have no statute similar to Section 131 of the County Government Act in California, which provides that "all books of record, maps, charts, surveys and other papers on file in the recorder's office must, during business hours, be open for inspection by any person, without charge; and that the recorder must arrange the books of record and indices in his office in such suitable places as to faciliate their inspection." Nor have we any general act, such as prevails in a number of States directing that all records in the offices of County and township officers shall be open for inspection by the public.

The provisions regarding county recorders, Sections 2340 and 2344, inclusive, are silent concerning such examination.

Section 2459 and 2471 designate the fees "for abstracts of title for each document embraced thereby" and "for searching records and files for each document necessarily examined, "but contain no words either authorizing or prohibiting the making of abstracts or searches by others than the recorder, or specifying whether he shall be entitled to compensation if the work is not performed by himself or his deputies.

The decisions on similar questions in other jurisdictions rest largely upon statutes not in uniformity with ours or with each other and there is a lack of harmony among the opinions not only in different states, but of the court and judges in the same state. We will consider some of these cases more particularly owing to the especial reliance placed by relator upon Burton v. Tuite and Lum v. McCarty, infra.

In Weober v Townley, 43 Mich., 534, decided in 1880, all the justices, including those of such high and widely recognized reputations as Cooley and Campbell, hold that there is no common law-right to make copies or abstracts of public records for speculative purposes, as for the compilation of a set of abstract books for selling abstracts of title and that no such right was given by an Act providing, "that the registers of deeds shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memorandums or transcripts therefrom during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose: PROVIDED: That the custodian of said records and files may make reasonable rules and regulations with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent the interference with the regular discharge of the duties of said register: AND PROVIDED FURTHER, That said register of deeds may prohibit the use of pen and ink in making copies or notes of records and files." Public Acts, Mich. 1875, No. 54, p. 51.

Speaking for the court, Marston C. J. said: "We are of opinion that under the common law relators have not the right claimed. The right to an inspection and copy or abstract of a public record is not given indiscriminately to each and all who may, from curiosity or otherwise, desire the same, but it is limited to those who have some interest therein. What this interest may be we are not called upon in the present case to determine. The question has usually arisen where the right claimed was to inspect or outain a copy of some particular document, or those relating to a given transaction or title. We have not been referred to any authority which recognizes the right of a person under the common law to a copy or abstract of the entire records of a public office in which he had no special interest, the object in view being simply private gain from the possession and use thereof.

'Relators do not ask for an inspection of a record or abstract thereof relating to lands in which they claim to have any title or interest, or concerning which they desire information in contemplation of acquiring some right or interest, either by purchase or otherwise. It is not as the agents or attorneys of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in the lands, but is for the further private gain and emolument of relators in furnishing information therefrom to third parties for a compensation then to be paid. it is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof, to enable them hereafter, for a fee or reward, to furnish copies to such as may desire the same."

Relator contends that this opinion was reversed by the same court in the leading case of Burton v. Tuite, 78 Mich., 363, determined in 1889. Such is conceeded to be the effect in the language there and in a number of decisions made later in that and other states, but in reality and stripped of dicta it was held that sales-books kept by the receiver of taxes, containing a statement of the sales of delinquent tax lands, and by him turned over to the city treasurer, who noted therein redemptions and sales, were public records and that relator, who had been employed by the owner of the property to examine in regard to tax sales, or where these sales were liens upon property to which he was furnishing abstracts, had the right to make such examinations of the public records as the necessity of his business might require, and that this right was assured to him under Act No. 205, Laws of Michigan of 1889, which provides: "That the officers having the custody of any county, city, or town records in this State shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose, "subject to conditions similar to those quoted in the Act of 1875 relating to registers.

In delivering the opinion, Morse, J., said: "I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have an interest in it, or intend tohave. I have also the right to examine any title that I see fit, recorded in the public offices, for the purpose of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office, and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain, as a part of the lawyer's daily business, and by the means of which, with other labors, he earns his bread.

"Upon what different footing can an abstractor be placed, within the law, without giving a privilege to one man or class of men that is denied to another? The relator's business is that of making abstracts of title, and furnishing the same to those wanting them, for a compensation.. In such business it is necessary for him to consult and make memoranda of the contents of these books. His business is a lawful one, the same as the lawyer's and why has not he the right to inspect and examine public records in his business as well as any other person?

"It is plain to see that the legislature intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. The respondent in this case is the lawful custodian of these sales-books, and is responsible for their safe keeping, and he may make and enforce proper regulations, consistent with the public right, for the use of them.

"It follows that he has no right to demand any fee or compensation for the privilege of access to the records, or for any examination thereof not made by himself or his clerks or deputies. He has no exclusive right to search the records against any other citizen. Lum. v. McCarty, 39 N. J. Law, 287; Boylan v. Warren, 39 Kan. 301 (18 Pac Rep. 174); State v. Rachac, 37 Minn. 372 (35 N. W. Rep. 7); People v. Pichards, 99 N. Y. 620 (1 N. E. Rep. 258); Hanson v. Eichstaedt, 69 Wis. 538 (35 N. W. Rep. 39)."

Apparently these remarks met the approval of Chamberlain J., who concurred without qualification, but not of the majority of the court, for Campbell, J., whose concurrence in the judgment made it effective, confined his opinion to the point that the relator had such an interest under the Act mentioned as entitled him to see the books in question. Sherwood, C. J., and Long, J., did not sit and these statements may be considered as sanctioned by only two of the five justices. The case rested on the Michigan statute. No English or other decision was cited that supported the assertion of Justice Morse that he know of no common law that denied the right of free inspection or required the citizens desiring to make it to show some interest in the record.

Although this language is interesting as a statement of the opinion of an able member of a court of high standing, it was not only unnecessary for the determination of the case as controlled by legislative enactment, and unsupported by any authority excepting the concurrence of one of the justices, but it was a begging of the question, for if no common law prevails in this country which prevents, and there is no decision sustaining the right of an abstract company or others to inspect or copy all the records in which it, or they, have no interest as owner or agent, it is evident that no such right exists unless granted by the statute. With no decision conceding or denying such right nothing appears on which to base the assumption that it is authorized by Common Law. The same may be said regarding the force of similar expressions quoted in the brief from other opinions.

In Day v. Button, 96 Mich., 600, it was held that the right to examine the records in the office of the register of deeds, and to make memoranda therefrom, for the purpose of making a set of abstract books was established by Burton v. Tuite, supra, but as we have seen, the majority of the court did not go so far in the earlier of these cases. This doctrine as broadened is better warranted by the statute in that state.

Distinguishing those cases and the records in the office of the register from those in suits between individuals, subsequently in Burton v. Reynolds, 110 Mich., 354, the court refused a writ of mandate to compel the Clerk of the Circuit court to permit one engaged in making abstracts of title to examine and copy a file in an action relating to land between private parties, upon a petition which negatived notice of the pendency of the action, and did not assert actual notice, nor state that the examination and copying the file was necessary to the completion of the relator's work.

In Brown v Knapp, 4 Mich., 132, the citizen seeking and refused inspection of liquor bonds filed with the county treasurer, and wishing information that would aid in a prosecution of an infraction of the law, had a different interest than one man has in the title to another's property.

In Lum v. McCarty, 39 N. J. Law, 287, a leading case cited to support the opinion in Burton v. Tuite above, the Court overruled Flemming v. Clark, 1 Vroom, 280, and held that county clerks were not entitled to fees for searches not made by themselves or assistants of the records in their offices, of deeds, mortgages and judgments. The statute provided for access to the records excepting those of judgments in the Circuit Court. The action was for the recovery of fees paid by the plaintiff's attorney under protest when he was refused inspection until he paid the same fees for the privilege of examining the records that the clerk would have been entitled to charge if he had made the examination. In justification of, and by way of distinguishing, a subsequent decision by the Supreme Court of New Jersey to which we shall refer later, it is proper to observe that the issue presented did not relate to the right of an abstract company or person without interest to copy or examine all the records. This should be borne in mind in considering the weight to which the opinion is entitled as bearing on the different issues with which we are confronted.

The case is more directly applicable to the question whether one authorized by statute under the designation of "all persons" and having an interest in property, may have his attorney search the records without the payment of fees." The court said: "By the third section of the 'Act to regulate fees,' provision is made for the compensation of county clerks for certain services, among which is the searching of the records in their offices. The provision cannot be extended by construction, so as to authorize a demand by the clerk for pay for services not, in fact, rendered by him or his assistants. The defendant, therefore, was not entitled to the fees in question, under that provision. The only other provisions which are claimed to have a bearing on the question, are the ninth section of the Act respecting conveyances,' which, after providing for the recording of deeds in books to be furnished for the purpose, adds 'to which books every person shall have access, at proper seasons, and be entitled to transcripts from the same, on paying the fees allowed by law,' (Nix. Dig. 146,) and the first section of the 'Act to register mortgages,' which, after like provision for registering mortgages of lands in proper books, adds, 'to which books every person shall have access at all proper seasons, and may search the same, paying the fees allowed by law,' (Nix. Dig. 610). It is also suggested that the absence of any provision for access by the public to the records of judgments of the Circuit Courts, favors the charge, so far as the records of those judgments are concerned. No authority for taking fees for searches not made by himself or his associates, is to be derived by the Clerk from either of the above-quoted provisions. The first, while it provides for compensation for transcripts, contains no qualification of the right of the public thereby declared, to access to the records, and it authorizes no charge whatever in connection with the exercise of that right. Though the language of the other may seem to qualify the right to search with the necessity of paying fees, yet the obvious construction of the provision is that the fees for search are to be paid only when the search is made by the clerk or his assistants. The right of the public to free access to the records carries with it the right to search without charge for the privilege. Nor can a claim on the part of the clerk to fees for a search not made by himself or his assistants, in the records of the judgment of the circuit court in his office, be justified by the fact that no special provision is made for access by the public to those records. They are no less free to the public, by reason of the absence of a provision declaring the right. They are in fact, public records and are public property, kept in a public place, at the public expense, for the public benefit. For the convenience of the public in examining them, the law provides for the making of proper indexes of their contents. Nix. Dig., 'Practice Act' Par. 77. The law expressly provides for free access, by the public to the records of attachment, notices of lis pendens, Circuit Court judgments docketed in the Supreme Court, and judgments of justices' courts docketed in the Courts of Commom Pleas. Nix. Dig., 39, 112, 442, 474.

"The clerk is the lawful custodian of the records, and indexes thereto, and is responsible for the safe-keeping thereof. His powers over them are such as are necessary for their protection and preservation. To that end, he may make and enforce proper regulations consistent with the public right for the use of them. But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to, and inspection and examination thereof, at proper seasons and on proper application. The clauses which declare the public right in this behalf, employ the most comprehensive and general language: 'All persons desiring to examine the same,' Every person shall have access.' It follows that the clerk has no right to demand any fee for the privilege of access to the records and indexes, or for any examination thereof not made by himself or by his assistants."

In Terry v. Williams, 41 N. J. 332, it was held that every person is entitled to the inspection of documents of a public nature, provided he has the requisite interest. The court enforced by mandamus in favor of a citizen the right of inspection of letters of recommendation filed as a basis for the issue of licenses. In principle the case is in some respects like the one before us because the New Jersey Statutes did not provide for the examination of these letters, but did for the inspection of many other records as we have seen. The following extracts from the opinion are also instructive regarding the controlling and disputed point in the Common Law.

"The documents in question are of a public nature, and the rule is that every person is entitled to the inspection of such instruments, provided he shows the requisite interest therein. And as Lord Denman remarks, in Rex. v. Justices of Staffordshire, C. A. & E. 84, the court is by no means disposed to narrow its authority to enforce by mandamus the production of every document of a public nature in which any citizen can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee.

"The relator asserts no interest to be subserved by an inspection of these letters, except that common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells.

"In England, the occasions which generaly have required the exercise of the power of the court to enforce inspection of public documents, have been those where a party has sought evidence for the prosecution or defence of his rights in pending litigation. In such cases, when the custodian of the documents was a party in the cause, the court usually intervened by rule, otherwise by mandamus. But the existence of a suit was not a sine qua non for the exertion of a power. In Rex v. Lucas et. al., 10 East 235, a mandamus was sought to compel

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